UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/811
25 July 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 811

Case No. 923: HALLET

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 30 May 1996, George J. Hallet, a former staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), filed an application requesting the Tribunal, inter alia:

"...

Plea 4. My OPAS [Operational Assistance] work contract was breached ...

...

(b) ... I request the Tribunal to rule in my favour and to specify appropriate acknowledgement from the Organization.

Plea 5. I am claiming the sum of US$5,000, categorically, as compensation for the amount I was deprived of (...) because of my accelerated repatriation on 29 February 1992, and for the additional cost of living expenses incurred by the inadequate cooking and laundry facilities while occupying Unit T21A, Red Sea Compound, Jeddah. I am requesting the Tribunal [to] rule in my favour and to specify that the Organization compensate me accordingly.

> Plea 6. I am contesting the validity of much of the contents of the letter dated 16 July 1995 (...) from ... [the] Assistant to the Project Manager. ... I am requesting the Tribunal to consider my explanatory statements relative to this plea and to rule in my favour."

Whereas the Respondent filed his answer on 29 October 1996;

Whereas the Applicant filed written observations on 9 May 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of ICAO on 10 May 1983, as Co-Manager, Air Traffic Services, Communications/Operations (COM/OPS), at the P-5, step III level, on a one year operational assistance (OPAS) appointment in Jeddah, Saudi Arabia, on the basis of an agreement concluded on 4 January 1976 between the Saudi Arabian Government and the United Nations Development Programme. The Applicant's contract of employment stipulated that his employer would be the Saudi Arabian Government, but that his services would be paid for by ICAO. The Applicant's appointment was successively extended until 9 May 1992, the date on which he was separated from service. At the time of the events which led to the appeal, the Applicant was Senior COM/OPS and Procedures Expert/Instructor, OPAS, at the P-5, step VIII level. On 6 January 1992, the Applicant signed a letter expressing his wish to extend his contract if renewal were to be offered.

On 12 January 1992, the Project Manager informed the Applicant that "on the basis of present requirements of the Government", ICAO would be unable to extend his contract beyond 9 May 1992. Taking into account accrued annual leave, his last day of duty was estimated to be 18 January 1992. The Saudi Arabian authorities requested the Project Manager to make arrangements for the Applicant "to continue on duty throughout the period of his accrued annual leave to the maximum extent possible prior to the

expiration of his contract on 9 May 1992." On 15 January 1992, the Project Manager requested from the Government authorities the Applicant's work programme, were he to work through his annual leave. This was submitted to the Project Manager on 20 January 1992. The Applicant was subsequently allowed by ICAO to work until 29 February 1992.

On 2 February 1992, the Applicant wrote to the Director, Technical Cooperation Bureau (D/TCB), stating that his "seniority assignment to a new hcuse at Continental Village was cancelled" and that he had been verbally assigned to a one-bedroom apartment at "Red Sea T Compound housing". He claimed that, contrary to the provisions of his contract, the housing he was "being directed to accept" was not subsidized by the Organization, but rather that he was subsidizing the Organization since he was being charged more for rent than the Organization was paying. He also complained that by requesting his work programme, the Project Manager "pre-empted the Government's prerogative", thereby making the Applicant responsible to an "'authority external to the Government'" in violation of his contract. In a reply dated 3 February 1992, from the Project Manager, the Applicant was informed that "you looked at the apartment in the Red Sea 'T' Compound during the week of 18 January 1992 and advised us on 22 January 1992 that it was acceptable to you."

On 10 February 1992, the Applicant wrote to the Secretary General, appealing what he considered to be breaches of his OPAS employment contract. The Applicant stated that he had been verbally threatened by the Project Manager as a result of writing directly to the D/TCB, on 2 February 1992, instead of communicating directly with the Project Manager. The Applicant also noted that he had been "forced, under duress, to accept a sub-standard one-bedroom flat in lieu of [his] seniority assignment of a new three-bedroom house in Continental Village"; he alleged that he was threatened with repatriation upon termination of his current housing assignment if

he did not accept. He reiterated that he was subsidizing the Organization in respect of housing charges, and that his contract had been breached when the Project Manager requested his work programme.

In a reply dated 18 March 1992, the Secretary General advised the Applicant, inter alia, of the criteria behind the new-housing assignments, and noted that the Applicant had not in fact subsidized the Organization since he was paying a rental of 13.5%, like all ICAO staff members or OPAS officers.

On 28 November 1992, the Applicant lodged an appeal with the Advisory Joint Appeals Board (AJAB).

On 7 February 1996, the AJAB adopted its report. Its findings and conclusions read, in part, as follows:

"7. FINDINGS

7.1 The Board notes the Appellant:

(a) Claims:

(1) Compensation, at the rate of US$5,000, for expenses incurred during his living in Unit T 21 A of the Red Sea Compound and for lost remuneration on his alleged accelerated repatriation; and

(2) an apology for moral injury caused by his treatment by the Project Manager.

(b) Seeks acknowledgement that his interpretation of the administrative procedures as they apply to an OPAS expert was appropriate.

7.2 ...

7.3 In respect of the Appellant's first claim, the Board notes that the Appellant did not present documented evidence on the problems in Red Sea Unit T 21 A which he had enumerated to the Board in support of his contention that the housing was sub-standard. Nor did the Appellant submit

documentation in support of his claim that he had incurred additional expenses as a result of the alleged sub-standard housing conditions in Red Sea Unit T 21 A.

7.4 ...

7.5 The Board notes that the burden of proof is on the Appellant and, in the absence of any conclusive evidence to support the Appellant's claims, the Board is unable to reach any conclusions.

7.6 The Board notes that the calculation of rental subsidy for Red Sea Unit T 21 A and the amount of rental deduction applied to the Appellant's salary was in line with the provisions of Field Personnel Instructions Manual (PI C.7) and application of the United Nations formula using the fixed percentage for Saudi Arabia of 13.5%.

7.7 The Appellant stated that his contract had been terminated and his repatriation accelerated, causing loss of salary. The Board notes that the documented evidence demonstrates that the Appellant's contract was not prematurely terminated. The Board also notes that the Appellant was given additional time past the calculated date of separation, 18 January 1992, resulting in his receiving salary from 18 January until 29 February 1992 rather than taking annual leave. The misunderstanding may have arisen from the request for the Appellant to take annual leave during the remainder of his contract in accordance with Field Personnel Instruction D.1 4 and Field Service staff rule 4.2 (c).

7.8 The Board finds that the relevant rules and practices were followed in respect of the non-renewal of the Appellant's contract, leave entitlements and repatriation, and that he received the remunerations owing to him.

7.9 Regarding the Appellant's second claim, the Appellant contends that his housing reservation in the Continental village was cancelled arbitrarily and that he was coerced into accepting sub-standard housing by the withholding of information on other available quarters. These contentions are contradicted by statements from the Project Coordinator and Assistant Project Coordinator who both contend that the Appellant's move to the Continental Village had only been cancelled after it was learnt that his (the Appellant's) contract would not be renewed and that he had been offered the choice of three other locations which were available for short term occupancy.

7.10 The Appellant further contends that decisions and actions taken by the Project Coordinator were detrimental to his interest and adversely affected him.

7.11 The Board notes that the burden of proof is on the Appellant and, in the absence of any conclusive evidence to support the Appellant's claims, the Board is unable to reach any conclusions.

8 CONCLUSIONS

8.1 Having considered the merits of the case, the Board unanimously concludes that the Appellant's case should be rejected."

On 11 March 1996, the Secretary, AJAB, transmitted to the Applicant a copy of the AJAB's report and the Secretary General's decision of 7 March 1996 thereon. This decision reads, in part, as follows:

"I am in full agreement with the findings and conclusions of the Board, and have therefore endorsed them."

On 30 May 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to move the Applicant to the Red Sea "T" Compound was a breach of his OPAS contract, since the housing unit was substandard and the Applicant effectively subsidized ICAO for the cost of his housing.

2. The request by ICAO for the Applicant's work programme also breached his employment contract since, by so doing, ICAO made the Applicant subject to an "authority external to the Government", in violation of the terms of his contract.

Whereas the Respondent's principal contentions are:

1. The Applicant was not threatened or coerced into moving to the Red Sea Compound; in any event, the Organization had no legal obligation to provide him with housing.

2. The Applicant was properly charged for his occupancy of Red Sea Unit T 21 A in accordance with the provisions of his contract, the rules and practices of ICAO and with the UN common system policies and procedures.

3. The plea that ICAO should not have been provided with the Applicant's work programme is not an appealable administrative decision.

The Tribunal, having deliberated from 3 to 25 July 1997, now pronounces the following judgement:

I. The Applicant appeals against a decision of the Respondent dated 7 March 1996, accepting the findings and conclusions of the Advisory Joint Appeals Board dated 7 February 1996.

II. The Applicant's appointment was to expire on 9 May 1992. In response to a request from the Saudi Arabian Government, ICAO agreed to allow the Applicant to work through part of his period of accrued annual leave, until 29 February 1992. Prior to informing the Applicant that his appointment would not be renewed after 9 May 1992, ICAO had proposed that the Applicant move to the Continental Village Compound, with effect from 30 January 1992. On 21 January, the Applicant learned that his housing assignment had been changed to the Red Sea housing unit. After inspecting the unit, the Applicant found it unacceptable, but he informed the Acting Project Manager that he would accept it if nothing else were available.

III. The Applicant alleges that the Organization was obliged to provide him with adequate, subsidized housing but instead forced him to accept a unit that was below the standard of housing provided to all other OPAS/ICAO personnel. The Tribunal notes that the Applicant's employment contract, as amended on 1 May 1984, provides that:

> "6. The Organization [ICAO] shall endeavour to provide the Officer with subsidized housing for the entire duration of the appointment.
>
> (...)
>
> Alternative housing arrangements may be made by the Officer only if the Organization cannot provide him with subsidized housing or in exceptional circumstances."

The Tribunal finds that the Organization was under no legal obligation to provide the Applicant with housing, but only that it had undertaken to endeavour to do so. The Applicant therefore had the option to search for alternative housing if he did not find the offered arrangements satisfactory. Further, the Tribunal notes that the Applicant admits informing ICAO that he would accept the unit in the Red Sea compound if nothing else were available. Although he alleges that he was coerced into accepting the unit, the Applicant has failed to provide evidence in support of his claim.

IV. Regarding the Applicant's contention that his housing was below the standard provided to other personnel, the Tribunal accepts the Respondent's explanation. According to the Administration, given the fact that funding for the project had not been cleared, housing was allocated not on the basis of seniority, but rather by taking into account such other factors as the length of a staff member's contract, the likelihood of its extension and the envisaged date of his or her separation. Further, the Applicant has not provided evidence in support of his claim for US$5,000 as

compensation for additional living expenses incurred as a result of the inadequacy of the Red Sea housing unit.

V. The Applicant alleges that, in contravention of his employment contract, the deductions made from his salary for Unit T 21 A, Red Sea Compound effectively forced him to subsidize ICAO with respect to rental charges. The Tribunal notes that a monthly rental deduction of Saudi Riyals (SR) 3,172 was made from the Applicant's salary. The record is unclear with respect to the actual monthly cost of the unit the Applicant occupied: the Respondent's documents indicate a cost of SR 3,300, whereas the Applicant claims that the unit cost SR 3,000 per month. However, the Tribunal does not find it necessary to resolve this disparity, since it considers that the decisive fact is that, like all ICAO or OPAS members, the Applicant was paying housing charges equal to 13.5% of the total amount of his net salary, post adjustment and assignment allowance, in accordance with article II, paragraph 6 and Annex 1, subsection (1) of his contract.

VI. The Tribunal next examined the Applicant's allegation that his housing assignment was arbitrarily limited to Unit T 21 A of the Red Sea Compound and that information on other available accommodation was deliberately withheld by the Project Manager. The Respondent contends that this claim is not receivable by the Tribunal since it is not an administrative decision. The Tribunal notes that the JAB considered the merits of this claim. The Tribunal finds that, although the actions in question do not stricto sensu constitute an administrative decision, if they were in fact taken in violation of the Respondent's contractual obligations or of the Field Staff Service Rules (FSSR) and/or the Field Operation Manual (FOM), the Tribunal may rule on them. However, the Tribunal finds that the Applicant has not produced sufficient evidence in support of this claim.

VII. The Applicant has requested the Tribunal to clarify the differences between an OPAS expert and various ICAO posts. The Respondent contends that it would not be proper for the Tribunal to make general pronouncements as to the distinctions between different posts. In this connection, the Tribunal recalls that it has held in the past that the FSSR and the FOM apply to OPAS personnel (Cf. Judgements No. 149, Mirza (1971) and No. 733, De Garis (1995)). Notwithstanding the foregoing, the Tribunal emphasizes that it will rule on such matters only insofar as they relate to the contractual interests of the Applicant.

VIII. The Tribunal notes that article III, paragraph 1 of the Applicant's contract stipulates that:

> "The Officer shall be responsible to the Government. In the performance of his duties, he shall neither seek nor accept instructions from ... any other authority external to the Government."

Article VII, paragraph 3, provides:

> "... any relevant matter for which no provision is made in this contract shall be settled according to the administrative practices of the Organization."

The Tribunal further notes that ICAO paid the Applicant's salary. Having taken the foregoing into consideration, the Tribunal finds that, with respect to the Applicant's professional duties, he was responsible to the Saudi Arabian Government. However, with respect to administrative and financial matters, he came under the authority of the ICAO Project Manager.

IX. The Applicant contends that his employment contract was breached when ICAO requested the Saudi Arabian Government to submit a work programme. The Tribunal considers it both necessary and appropriate that the duties attaching to a post such as the

Applicant's are established by consultation between the host Government and the Organization. This is particularly true when the Organization is responsible for certain aspects of the financial management of a project and must therefore ensure that there are sufficient funds to cover the extension of employment contracts. Accordingly, the Tribunal rejects this claim.

X. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/812
25 July 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 812

Case No. 881: EVERETT

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Mrs. Deborah Taylor Ashford;

Whereas at the request of Mavis A. Everett, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application with the Tribunal until 31 January, 30 April, 31 July and 31 October 1995;

Whereas, on 18 October 1995, the Applicant filed an application which contained pleas requesting the Tribunal to order the Respondent:

> "(a) To rescind forthwith the decision to place her on special leave with full pay (SLWFP);
>
> (b) To assign her to her post No. 78607 which she encumbered before she was sent on SLWFP, or an established G-6 post (not a temporary post) commensurate with her qualifications and experience;
>
> (c) To credit her with all annual leave entitlement accrued from 17 May 1993 to the date she is reinstated ...; and
>
> (d) To compensate her in the amount of $10,000, for the personal injury, humiliation and stress suffered as a result of the uncertainties to which she has been subjected."

Whereas, on 17 September 1996, the Applicant communicated to the Tribunal that, on 28 August 1996, she had received notice that her separation would take effect on 31 August 1996;

Whereas the Respondent filed his answer on 23 September 1996;

Whereas the Applicant filed written observations on 31 October 1996, in which she amended her pleas to delete subsection (c) above and to replace it with the following:

> "That should the Respondent decide, in the interest of both parties, not to reinstate her in her post or another G-6 core post commensurate with her qualifications and experience, that compensation be ordered in the amount of three years' net base salary compounded from 9 February 1997, the date up to which she was apparently guaranteed employment against Post No. 1388 (...), through 30 November 1999, the date on which she would have retired from the Organization.
>
> That the Respondent be ordered to pay an additional compensation in the amount of five months and nine days' net base salary, compounded from 31 August 1996, the expiry date of the SLWFP (which coincides with the date of her separation), and 9 February 1997, the date up to which she was apparently guaranteed employment against Post No. 1388."

Whereas, on 16 June 1997, the Applicant filed additional documents and comments with the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 6 January 1977 on a three-month, fixed-term appointment as a Clerk/Stenographer at the G-3, step IV level. Her appointment was subsequently extended and, on 1 January 1983, became probationary. On 1 January 1983, the Applicant was promoted to the G-4 level, and her functional title changed to Secretary. The Applicant was granted a permanent appointment with effect from 1 January 1984. She was assigned to the Division of Personnel (DOP), Policies and Compensation Section. With effect from 1 January 1986, she was promoted to the G-5 level and, on 1 January 1991, she was promoted to the G-6 level, as a

Classification Assistant. From 23 March 1991 to 24 June 1991, she was assigned to the UNDP office in Namibia as a Job Classification Examiner.

On 24 February 1993, the Applicant signed her performance appraisal review (PAR) for the year 1992 with a rating of 5, i.e. unsatisfactory, by the Management Review Group (MRG). In section 10 of the PAR, the MRG justified this rating, inter alia, as follows:

> "... the MRG views with utmost seriousness the problems ... regarding her difficulty in maintaining harmonious relations with her colleagues in the classification programme. ... In this regard, it is the view of the MRG that these difficulties and their impact, which go beyond affecting the work of the incumbent, would more appropriately support a final PAR rating of five. In arriving at this conclusion, the MRG notes that the specifications for a five rating of unsatisfactory performance specify that difficulties in working relations with others which are poor to the point of being detrimental to the work warrant the five rating. This situation clearly prevails in this case. The MRG wishes to go on and note that the problems existing for [the Applicant] are not related to simple misunderstandings regarding her assignments. Indeed it does acknowledge that the technical work produced is usually satisfactory. However the use of abusive language, the lack of positive interaction on a daily basis or during general meetings of the classification staff make it difficult to envisage what remedial actions could be taken to improve the working relationships. The behaviour displayed by [the Applicant] which has contributed to stress in the work place goes beyond simple misunderstandings. Whatever the steps which are now taken, it is clear that the classification programme can no longer sustain what has become an untenable situation."

The Applicant, in her final comments on the PAR, requested that arrangements be made for a public inquiry into the allegations raised against her by the MRG.

On 27 May 1993, the Director, DOP, wrote to the Applicant informing her that he confirmed the decision to place her on special leave with full pay (SLWFP) for two months, beginning 17 May 1993, after a review of her 1992-93 performance, which concluded that she

could no longer serve in DOP. In his letter, the Director, DOP, also mentioned that "we will endeavour to find overseas postings for you in order to provide a fresh opportunity for you to perform satisfactorily." Further, he noted that, should an overseas posting not produce the "desired results", the Applicant should consider an agreed termination on the following terms: "with the most generous compensation the Staff Rules allow, inclusive of special leave with full pay until you reach early retirement age in November 1994. We honestly believe that if another opportunity for you cannot be found, early retirement may be in your own best interests. We believe continuation in the Division of Personnel is not in the best interests of team work so essential to our requirements".

On the same day, the Applicant sent a memorandum to the Director, DOP, in which she agreed to be assigned to a UN peace-keeping mission "for a limited period" on the understanding that "a lien on a core post with the UNDP at [the] ... level of G-6 will be maintained for the entire duration of [her] mission."

In a reply dated 21 June 1993, the Director, DOP, informed the Applicant that UNDP "will not be able to maintain a lien for you [the Applicant] against a specific post within UNDP while you [the Applicant] are on mission" but that UNDP "will endeavour to identify a suitable post for you [the Applicant] outside of the Division of Personnel at the conclusion of [her] ... mission assignment. Should all else fail, [UNDP] ... will be pleased to discuss an agreed separation ..."

On the same day, the Applicant submitted a rebuttal to her 1992 PAR, in accordance with the circular UNDP/ADM/93/21 of 30 April 1993.

On 26 July 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB) for the suspension of action on the decision to place her on SLWFP.

On 27 September 1993, the Chief, Staffing, DOP, wrote to the Applicant, informing her that she had not been placed in a vacant post during the recently conducted Staff Placement Exercise; he concluded by saying that the Applicant would "continue to be on SLWFP pending further efforts to identify a suitable assignment".

On 5 October 1993, the Applicant wrote to the Secretary of the JAB, again requesting a suspension of action as, due to an oversight, her first request had not been considered.

On 12 October 1993, the PAR Rebuttal Panel of Reference met to review the issues raised by the Applicant and interviewed several staff members from her former work unit, as well as members of the MRG.

On 4 November 1993, the JAB adopted its report on the request for suspension of action. Its considerations, conclusion and recommendation read, in part, as follows:

> "Considerations
>
> ...
>
> 15. Although the Panel could empathize with the Appellant's account of the psychological damage wrought by her suspension from her duties, it could not agree that that constituted irreparable harm.
>
> ...
>
> Conclusion and Recommendation
>
> 19. The Panel concludes that the decisions taken by UNDP, if allowed to take their course, will result in irreparable injury to Appellant and that, therefore, she is entitled to the protection afforded by a suspension of action.
>
> 20. ... The Panel recalls that the hearing on Appellant's request for a suspension of action was delayed for over two months because of an error on the part of the UN Administration (...). The Panel, therefore, urges the Administration to move quickly to limit further injury to Appellant.

> 21. The Panel recommends that action be suspended on filling core post No. 78607 until such time as Appellant is placed on another post or the appeals procedure is completed, whichever is the earlier. If that post has been filled at the time of the Secretary-General's decision on this recommendation, then, pending the outcome of the appeal, such other G-6 or G-7 level core post as may be available should be designated for the staff member by the UNDP Administrator."

On 19 November 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General ... has taken note of the Board's finding that the specific decision contested, the decision of UNDP to place you on special leave with full pay (SLWFP), will not, taken alone, cause you irreparable harm. As you have been on SLWFP since 17 May 1993, the Secretary-General finds that the decision contested has been fully implemented. In accordance therefore with staff rule 111.2(c)(ii), the Secretary-General has decided not to grant your request for suspension of action.
>
> Although the Secretary-General has addressed only your specific request, he has noted the concerns and recommendations of the Board regarding subsequent decisions of UNDP. The Secretary-General has also noted that UNDP's decisions were taken on the basis of your latest PAR and that the rebuttal process in respect of this PAR is near completion. When the results of the rebuttal process are a part of the record and when the Board has had a chance to thoroughly examine the substance of your appeal, the Secretary-General will consider the Board's recommendations with great care."

On 25 January 1994, the PAR Rebuttal Panel adopted its report, recommending, inter alia, that the MRG rating of "5" be upheld.

On 23 June 1994, the JAB adopted its report on the substance of the Applicant's appeal. Its unanimous recommendations read as follows:

"17. ...

(a) Placing the staff member on SLWFP was not a violation of her rights under the Staff Regulations and Rules. Although the manner in which it was done raises some questions of whether all the elements of due process were strictly observed, there was no evidence that any violation, if indeed there was one, entitles the Appellant to compensation.

(b) The Organization should make every effort to find suitable employment for the Appellant within the Organization, compatible with her abilities, including mission service. Such post need not conform, however, with the conditions the Appellant has sought to have attached to it which are not within her entitlements. In any post, Appellant should be provided with counselling to assist her with any problems of inter-personal relationships she may have.

(c) Should the Appellant refuse reasonable offers of suitable posts, a remedy other than the prolongation of SLWFP should be sought to regularize her status."

On 5 August 1994, the Secretary-General transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report and has taken note of its conclusions that your rights were not violated and that you were not entitled to compensation. He has also taken note of the concerns of the Board regarding your placement on special leave with full pay. The Secretary-General has accepted the Board's recommendation that every effort be made to find suitable employment for you within the Organization, compatible with your abilities, including mission service, and that such post need not conform with the conditions which you have sought to have attached to it which are not within your entitlements. The Secretary-General expects that you will not refuse reasonable offers of suitable posts."

On 18 October 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to place the Applicant on SLWFP was arbitrary, violated due process, and was taken as a sanction against her; this constitutes an abuse of the Secretary-General's discretionary powers.

2. The Respondent acted in bad faith by giving the Applicant assurance that if she accepted a peace-keeping mission, UNDP would endeavour to find her a suitable post at the conclusion of the mission assignment, when in fact the Respondent intended to abolish the Applicant's post.

Whereas the Respondent's principal contentions are:

1. Placement of an unreasonable staff member on special leave with full pay while searching for a suitable position is a reasonable act of administrative discretion.

2. The Applicant was properly considered for available posts for which she might be suited but the very lengthy and thorough searches for such posts proved unsuccessful .

The Tribunal, having deliberated from 1 to 25 July 1997, now pronounces the following judgement:

I. The Applicant received a rating of "unsatisfactory" in her 1992 performance appraisal review (PAR) due to difficulties with her interpersonal skills and, as a result, was placed on special leave with full pay (SLWFP). The Tribunal has not considered it necessary to review the substance of the PAR but notes that the Applicant instituted a rebuttal to the PAR in accordance with established procedures. The Panel of Reference affirmed the unsatisfactory PAR rating. The Tribunal reviewed the decision of the UNDP Department of Personnel (DOP) to put the Applicant on SLWFP.

II. With respect to the initial decision to place the Applicant on SLWFP, the Tribunal agrees with the JAB that this decision was not taken as a disciplinary measure and thus was not subject to due process requirements. It was not motivated by a desire to punish the Applicant for her conduct, but rather by the determination that the Applicant could no longer serve effectively in the DOP. It was within the Respondent's discretion to conclude that the Applicant's use of abusive language, her disruptive outbursts, and her uncooperative disposition contributed to a tense and hostile work environment which prompted two of the Applicant's co-workers to request transfers. It was also within the Respondent's discretion to determine that it would be in the best interest of the Organization to place the Applicant on SLWFP until an alternate post could be found for her. The Tribunal notes that the Respondent's action in preventing the Applicant from access to her computer and collecting her pass contributed to the Applicant's impression that she was being disciplined.

III. The Tribunal is concerned by the Respondent's failure to conform to established performance evaluation procedures. The UNDP/ADM/93/21 of 30 April 1993 articulates a process comprised of "a minimum of three essential and mandatory steps", including a mid-year review, which, together, ensure that the staff member is informed of any problems that may exist in respect of his or her performance. The Respondent failed to abide by his own procedures and deprived the Applicant of a written mid-year evaluation. The Tribunal holds that the Respondent is obliged to respect his own procedures.

IV. The Tribunal is also concerned by the Respondent's correspondence with the Applicant following notification of the SLWFP. The Respondent argues that the purpose of the SLWFP was to remove the Applicant from the DOP where she could no longer serve

effectively, but that during the SLWFP the Respondent would find a new placement for the Applicant. The Respondent's letter to the Applicant, however, states that "if our efforts do not produce the desired results of a new placement[,] we will be pleased to discuss an agreed separation" and that "early retirement may be in your own best interests." The Tribunal holds that not only is SLWFP not a disciplinary measure, but that it should not be used as a mechanism to encourage staff to separate from service or to take early retirement.

V. Although the Respondent's initial decision to place the Applicant on SLWFP was a proper exercise of his discretion, the Tribunal finds that maintaining the SLWFP for three years violated the principles of due process. First, the Tribunal notes the Respondent's rejection of the JAB's unanimous recommendation to suspend the SLWFP pending a determination of the appeal on the merits. The Tribunal also notes that the Respondent generally follows a policy of accepting unanimous JAB recommendations except where a major question of law or principle is involved. Despite the foregoing, the Secretary-General rejected the JAB's unanimous recommendation to suspend the action, overriding the JAB's concern that prolonging the SLWFP might result in irreparable harm to the Applicant. Instead, the Respondent determined that the contested action, a two-month SLWFP, had already been fully implemented and could not therefore be suspended.

The Tribunal finds the Respondent's conclusion on this issue illogical. Precisely because the two-month SLWFP had ended and yet the Applicant remained on special leave, the Respondent should have heeded the JAB's recommendation that further SLWFP would result in irreparable harm.

VI. Second, the Tribunal notes the JAB's determination that, although the SLWFP did not, at that time, amount to a violation of

the Applicant's rights, the duration of the SLWFP for more than a year was "if not excessive, unduly prolonged." The JAB concluded that a staff member has a right to be given a task and that the Organization should make every effort to find the Applicant suitable employment. The Respondent accepted the JAB's recommendations.

VII. Since 1994, the only evidence of the Respondent's attempts to find the Applicant a suitable post are an unsuccessful placement exercise in March 1995 and various interviews in May and June of 1996. While the Tribunal acknowledges the Respondent's recent efforts to find the Applicant employment, the Tribunal is concerned by the lack of efforts made prior to May 1996. The Applicant had been on SLWFP since May 1993 and appears not to have been given consideration for an alternative post until three years later. The Respondent alleges that he had difficulty placing the Applicant because of her 1992 PAR, but provides no evidence to support this claim. Rather, the reports from managers who interviewed the Applicant in May and June 1996 indicate a variety of reasons why the Applicant was not selected. The Tribunal notes that some of the reports indicate a lack of interest on the Applicant's part. However, several other reports suggest that the Applicant simply was not the most qualified candidate or, in at least one instance, was overqualified for the post in question. The Tribunal recognizes that the Respondent was constrained by the availability of alternate posts but this should have motivated him to make a concerted effort throughout the duration of the SLWFP and not simply in its final months. The Tribunal concludes that the Respondent failed to make a serious, good faith effort to find the Applicant an alternative post, thereby incurring considerable expense in continuing the SLWFP for over three years while depriving the Organization of the staff member's service.

VIII. Finally, the Tribunal notes that the personnel report sent to the Applicant in May 1996 indicated that she was posted against a position with effect from 9 February 1997. This report gave the Applicant false hope that her employment with the Organization would continue. The Applicant's reasonable expectations were disappointed when she was notified in August 1996 that her post was to be abolished and that she was to be separated from the Organization. In the context of the Applicant's three year endeavour to end the SLWFP, the decision to separate the Applicant from the Organization, after notifying her that she was to encumber an established post, amounts to bad faith.

IX. The Respondent properly exercised his discretion when he placed the Applicant on SLWFP, pending efforts to find her an alternate post outside the DOP. However, the Respondent failed to suspend the action pending a review of the merits, in contravention of the JAB's unanimous recommendation. He continued the special leave for a three year period. Coupled with the failure to make a serious, good faith effort to find an alternate post throughout the duration of the SLWFP, this amounts to a violation of the Applicant's rights. Although the Applicant suffered no financial loss during the SLWFP, she did suffer from humiliation, stress and uncertainty that continued until her separation from the Organization. The Tribunal has previously awarded compensation for "uncertainties and harassments" despite a lack of financial loss. (Cf. Judgements No. 215, Ogley (1976) and No. 92, Higgins (1954)).

The Tribunal holds that the Applicant is entitled to compensation for the lapses of the Respondent described above and the consequent humiliation, stress and uncertainty she endured throughout the three-year period during which she was placed on SLWFP. The Tribunal assesses this compensation at $3,000.00.

X. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount of $3,000.00.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/813
25 July 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 813

Case No. 859: EMBLAD

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 10 February 1995, Mats Wilhelm Emblad, a former staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 17 May 1995, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal to:

> "(a) Uphold and demand the implementation of the Joint Appeals Board's recommendations. ...
>
> (b) Investigate the extent to which the United Nations Rules and Regulations and Procedures have been neglected or violated in the handling of this case, as well as the extent to which my human rights, in particular my right to due process, have been violated.
>
> (c) Sanction and reprimand those responsible for not adhering to and respecting United Nations Rules and Regulations and Administrative Instructions from the Secretary-General (instructions concerning the filing of adverse material, the use of legally questionable evidence material), and for denying me a hearing of the case.

(d) Investigate and clarify the processes leading to the Under-Secretary-General's decision to reject the recommendations of the Joint Appeals Board, without further hearing.

(e) Award me appropriate compensation for the loss of my United Nations employment and the incurred pain and suffering caused by the accusations, harassment and defamation I have been subjected to."

Whereas the Respondent filed his answer on 18 January 1996;

Whereas the Applicant filed written observations on 30 June 1996;

Whereas, on 24 October 1996, the Applicant submitted additional observations to the Tribunal;

Whereas, on 28 October 1996, the Tribunal notified the parties, pursuant to article 18 of the Rules of the Tribunal, of a defect in procedure that would warrant remand of the case, in accordance with article 9, paragraph 2 of the Tribunal's Statute, and requested the Respondent to notify the Tribunal whether he wished the appeal to be remanded for institution of the required correction of procedure or whether the Tribunal should decide on the substance of the case;

Whereas, on 29 October 1996, the Respondent advised the Tribunal of his preference that the Tribunal adjudicate the case;

Whereas, on 6 November 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which the Respondent did, on 8 and 15 November 1996;

Whereas, on 3 December 1996, the Tribunal informed the parties that it had decided to adjourn consideration of the case to its next session, commencing on 30 June 1997;

Whereas, on 31 January 1997, the Respondent submitted additional documents to the Tribunal, in response to the Tribunal's questions posed on 6 November 1996;

Whereas, on 11 February 1997, the Tribunal requested the Applicant to provide it with his views on the Respondent's answers

to the questions posed on 6 November 1996, which the Applicant did, on 22 May 1997;

Whereas, on 22 May 1997, the Applicant requested the production of certain documents;

Whereas, on 26 June 1997, the Applicant submitted additional observations to the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNHCR on 8 April 1991, pursuant to the Junior Professional Programme, as an Associate Repatriation Officer, on a one year fixed-term appointment, at the P-2, step I level. He was assigned to Guatemala City, Guatemala, for a period of one year. The Applicant's appointment was extended twice, for two further fixed terms of one year. On 1 May 1992, he was assigned to Betel, Guatemala. On 1 November 1992, he was reassigned, as an Associate Programme Officer, to Santo Domingo, Dominican Republic.

With effect from 1 November 1993, the Applicant was selected for the post of Programme Coordination Officer, Programme Coordination and Budget Section, at UNHCR Headquarters. He was offered a one year fixed-term project personnel appointment at the L-2, step III level. The offer of appointment was sent to the Applicant and he signed it on 1 November 1993. This appointment was extended on 1 November 1994, for a further period of one month, two weeks and one day, to 15 December 1994, and thereafter to 31 January, 28 February and 31 March 1995, when he separated from service.

While the Applicant was serving in the Dominican Republic, dealing with refugees from Yugoslavia, allegations of misconduct were raised against him in relation to the resettlement in the U.S.A. of 19 Montenegrin refugees. The Applicant was alleged to have planned to make arrangements for refugees to resettle in the United States, in return for a fee of $16,000 per person.

The allegations were investigated between 17 and 24 September 1993, by a team (hereinafter the Investigation Team) consisting of the Chief, Internal Audit Section, United Nations Office at Geneva (UNOG), the Director, Division of Human Resources Management (DHRM), UNHCR, and the Regional Programme Officer, UNHCR. Refugees in the Dominican Republic, their relatives in the U.S.A., UNHCR Staff Members and the Applicant were interviewed. A tape-recorded conversation between the Applicant and some of the refugees was reviewed. The Applicant claims that this tape was fabricated, and that it does not reflect the true content of the conversation at issue.

On 24 September 1993, the Director, DHRM, sent a memorandum to the Applicant, attaching the report of a "Preliminary Investigation of the Allegations of Misconduct regarding Mr. Mats Emblad" (hereafter the Report) and requested comments from the Applicant. The Director, DHRM, simultaneously apprised the Applicant of his right to counsel.

On 7 October 1993, the Applicant submitted comments to the Director, DHRM. In his comments, the Applicant explained that fear for his safety had been the sole motivating factor for his statements made on the tape, since he had received repeated threats on his life. He stated:

> "... Foolishly I instead tried to dissuade them from any further contacts by referring to high price for the other, i.e. illegal ways to enter the U.S.A. Therefore, when Mr. ... telephoned me at the office, I made the unfortunate reference to the USD 16,000. I did however, reiterate that I personally would not be involved in any illegal operation."

Shortly thereafter, on 18 October 1993, a new director of DHRM assumed his functions at the Office of the High Commissioner.

On 22 October 1993, following normal appointment procedures, the Administration sent a formal letter of reappointment to the Applicant offering him a position at UNHCR Headquarters in Geneva.

On 1 November 1993, the Applicant signed a Letter of Appointment and assumed his duties.

On 4 February 1994, the new Director of DHRM met with the Applicant to discuss the allegations against him and, in particular, the tape recording referred to above. In a memorandum dated 11 May 1994, the Director, DHRM, after reviewing the tape, acknowledged that some parts of the tape had been spliced together. However, he believed the relevant portions of the tape to be a recording of one integral conversation. He attached a transcript of this conversation to his memorandum to the Applicant.

On 13 May 1994, the Director, DHRM, informed the Applicant that his appointment would not be extended after its expiration date of 31 October 1994. On 16 May 1994, the Applicant wrote to the Director, DHRM, and to the Deputy High Commissioner, contesting the "re-opening" of the case.

On 19 May 1994, the Director, DHRM, informed the Applicant that the case had never been closed. He stated that the decision to give the Applicant a new appointment had been taken before the allegations against him had been fully investigated. Furthermore, as a result of a change in the Office of DHRM in mid-October 1993, there had not been sufficient time to take a final decision on the Applicant's case.

On 28 June 1994, the Applicant wrote to the Secretary-General, requesting the direct submission of his appeal to the Tribunal. This request was denied.

On 19 July 1994, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB). The JAB adopted its report on 29 November 1994. Its conclusions and recommendations read as follows:

> "40. ..., the Panel concludes that the handling of the case by the Administration contained some irregularities and that, by denying due process to the Appellant in accordance with

the Staff Rules and Regulations, it was detrimental to the interests and rights of the Appellant.

41. In view of the above, the Panel recommends that the rights of the Appellant should be fully restored, i.e. (i) all the documents removed from the Official Status File of the Appellant should be returned to the File; and (ii) his contract should be extended for a period of one year, as recommended by his supervisor in a memorandum dated 5 September 1994, and that the case be referred to the Joint Disciplinary Committee, as provided for under Chapter X of the Staff Rules and Regulations, to establish if there is sufficient evidence to substantiate the allegation of serious misconduct which would warrant disciplinary action. In the event that the Appellant is cleared of the allegation of serious misconduct, these events should not affect his career prospects within the Organization.

42. The Panel makes no further recommendation in support of this appeal."

On 13 January 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The incidents in which you have been involved in 1993, in the Dominican Republic, are of a grave and serious nature. Your admission that you offered to make 'arrangements' for refugees at a price of $16,000 per person and your other statements during the investigation confirm that you did not exercise sound judgement in your functions at UNHCR. Such unsatisfactory performance is well below the standards required from an international official and tarnishes the image of the United Nations as well as the work of your colleagues who act with integrity.

While the so called threat to your life may be a mitigating factor in your favour, it nevertheless does not justify your poor performance, actions and statements with the refugees. Furthermore, the Secretary-General can not accept the view of the JAB when it refers to the special procedure of regulation 9.1 (a) which does not apply in your case, nor accept the JAB's opinion that this matter be considered at the disciplinary level, an issue which is beyond its competence as stated in paragraph 30 of the Report.

Considering that there was no commitment nor expectancy of renewal of your contract and in the use of his discretionary authority, following a complete review of the facts of this case, the Secretary-General finds no reason to reverse the decision not to renew your contract."

On 17 May 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to refer the Applicant's case to a joint disciplinary committee for proper consideration of the allegations of misconduct. In not doing so, the Respondent acted in contravention of the procedures required by the Staff Rules.

2. In re-opening the case after offering him an appointment, the Respondent subjected the Applicant to double jeopardy.

Whereas the Respondent's principal contentions are:

1. By conducting an investigation and by giving the Applicant an opportunity to respond, while apprising him of his right to counsel, the Secretary-General respected the Applicant's due process rights.

2. The United Nations Charter requires the highest standards of efficiency, competence, and integrity and the Secretary-General may take account of relevant statements and conduct to assess whether a staff member meets such standards.

The Tribunal, having deliberated from 2 to 25 July 1997, now pronounces the following judgement:

I. The Applicant was a staff member of UNHCR from April 1991 to 31 March 1995, when his fixed-term contract expired. The contract was not renewed, following an investigation into allegations of misconduct against him. These allegations were transmitted to the Applicant on 24 September 1993, for his comments, which he provided on 17 October 1993. Thereafter, the Applicant was granted a one-year reappointment. In February 1994, the new Director, Division of Human Resources Management (DHRM), UNHCR, met the Applicant to discuss the allegations of misconduct. Following further correspondence on the matter, the Applicant was informed in May 1994, that his appointment would not be renewed after its expiration in October 1994. It is that decision which the Applicant challenges.

II. A memorandum dated 12 July 1994, from the Director, DHRM, UNHCR, to the High Commissioner indicates that the reason for the non-renewal of the Applicant's appointment was the allegation of misconduct, namely that the Applicant had offered to assist a group of refugees in the Dominican Republic to enter the U.S.A. by illegal means, for a large sum of money. Interviews with these refugees and their family members in the U.S.A. were conducted during the course of the September 1993 investigation. They brought into evidence a tape recording of a telephone conversation in which the Applicant made a statement suggesting that illegal arrangements could be made and indicating the high cost of such arrangements. The Applicant concedes making this statement, but contends that he did so due to fear, that it was a foolish effort to diffuse tension and hostility, and that a further statement that he would not be involved in such an illegal undertaking was omitted from the tape recording, which he alleges had been tampered with. The Respondent concedes that the tape recording was spliced together, but maintains that the Applicant's statement was an integral portion of the recording and was sufficient justification for the non-renewal of his appointment.

III. Immediately upon receiving an allegation of misconduct against the Applicant, UNHCR initiated an investigation, in accordance with the Staff Regulations and Staff Rules. The record indicates that the investigation was concluded by the Applicant's supervisor, who forwarded his conclusions to the Deputy High Commissioner with a recommendation that the Applicant be reprimanded. However, following the response made by the Applicant to the allegations against him, no findings or recommendations were transmitted to him, nor was he reprimanded. An offer of reappointment was extended to the Applicant. The Applicant contends that the investigation was re-opened in February 1994, and that this constitutes double jeopardy. The Tribunal holds that although the offer of reappointment made to the Applicant did not constitute notice to him that the investigation had been concluded, the investigation had in fact been concluded by the Director, DHRM, UNHCR, before his departure from the post. The Director's recommendation that the Applicant be reprimanded was never implemented.

IV. In February 1994, a new Director, DHRM, UNHCR, reviewed the report of the former Director and re-opened the investigation. As a result, the Administration decided to allow the Applicant's appointment to expire. This decision was taken, purportedly, in the interest of the Applicant, as evidenced by a memorandum dated 12 July 1994, from the Director, DHRM, UNHCR, to the High Commissioner. He stated that, unlike disciplinary procedures, non-renewal of the Applicant's contract would leave no official mark on the Applicant's record. The memorandum stated: "I am confident that should UNHCR present this case formally in New York, summary dismissal would be decided upon". Based on this assumption, the Applicant was denied the opportunity he would have had through disciplinary proceedings to establish his innocence. The Tribunal agrees with the conclusion of the Joint Appels Board that this

decision, in effect, constituted a presumption of guilt. It resulted in the non-renewal of the Applicant's appointment and denied him the due process to which he was entitled under the Staff Regulations and Staff Rules, and which he would have received had the case been referred to a joint disciplinary committee, or even if the Applicant had been summarily dismissed.

V. The Tribunal notes that, in some circumstances, a decision to allow a staff member's appointment to lapse without undertaking formal disciplinary proceedings against the staff member for misconduct may well be in the interest of the staff member. However, such an arrangement must be made with the consent of both the staff member and the Administration. The Tribunal stresses that the option of administrative, as opposed to disciplinary action, should only be resorted to when it does not prejudice or damage the position of the staff member in question. (Cf. Judgement No. 610, Ortega (1993), para. VIII). In this case, the Applicant was vehemently opposed to resolution of the matter by allowing his contract to expire. He wanted, and was entitled to have, an opportunity to rebut the allegations of his alleged misconduct. A memorandum by the Director, DHRM, dated 14 October 1993, recommended that the Applicant be reprimanded rather than be subjected to disciplinary action, as his behaviour was "due to his inexperience and lack of guidance rather than to dishonesty". This recommendation was not implemented. The Administration decided later that the Applicant's behaviour did constitute "serious misconduct". Despite this decision, the Administration did not proceed with disciplinary measures. The Administration did not follow its own established procedures. It thereby deprived the Applicant of the procedural safeguards set forth in the rules governing disciplinary proceedings.

VI. The Tribunal is not in a position to conduct a fact-finding proceeding ab initio in respect of a disciplinary matter. However, the Tribunal finds that, due to the Respondent's failure to provide the Applicant the due process that must be accorded in disciplinary matters, the Applicant is entitled to compensation which the Tribunal assesses at twelve months of his net base salary at the rate in effect on the date of his separation from service.

VII. For the foregoing reasons, the Tribunal orders the Respondent:

(1) To pay to the Applicant twelve months of his net base salary at the rate in effect on the date of his separation from service.

(2) To expunge from the Applicant's official status file all documents relating to the incident as being prejudicial to him.

VIII. The Tribunal rejects all other pleas, including the Applicant's request for the production of further documents.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/814
25 July 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 814

Case No. 918: MONTELEONE-GILFILLIAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Beatriz Monteleone-Gilfillian, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal until 30 April 1996;

Whereas, on 23 April 1996, the Applicant filed an application requesting the Tribunal, inter alia:

"(a) To rescind the decision of the Secretary-General rejecting the favourable recommendations of the Joint Appeals Board;

(b) To find and rule that the Secretary-General failed to respect the right of the Applicant to full and fair consideration for promotion and that, as a result of procedural irregularities and the injection of extraneous considerations, the Applicant was denied such full and fair consideration;

(c) To find and rule that the Applicant has been subjected to prejudicial and discriminatory treatment which entails the responsibility of the Respondent for the adverse effects upon her career and professional reputation;

(d) To find and rule that the Joint Appeals Board erred as a matter of law and equity in failing to review the totality of the Applicant's claims and in failing to provide appropriate and adequate compensation for the harm done to the Applicant for violation of her rights under the Staff Regulations and Rules;

(e) To order that the Applicant be given immediate consideration for promotion to the P-3 level with appropriate retroactive effect to April 1992;

(f) To award the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant to her career, reputation and psychological well-being as a result of the Respondent's actions or lack thereof;

(g) To fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case; [and]

(h) To award the Applicant as costs, the sum of $5,000.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 7 January 1997;

Whereas the Applicant filed written observations on 22 May 1997;

Whereas, on 11 July 1997, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 1 July 1968, as a Clerk-Typist on a three month fixed-term appointment at the G-2, step III level. With effect from 29 October 1968, her appointment was converted to probationary and, on 1 February 1969, she was promoted to the G-3 level. After receiving a permanent appointment with effect from 1 July 1970, she received

promotions through the G-5 level, and, on 1 November 1977, became an Administrative Assistant. On 5 February 1979, she was given a special post allowance (SPA) to the P-2 level, as an Associate Recruitment Officer, serving in the United Nations Centre for Human Settlements in Nairobi, Kenya. On 1 January 1984, she returned to Headquarters and served as an Administrative Assistant at the G-5 level in the then Department of Technical Cooperation for Development (DTCD). On 1 September 1984, the Applicant was assigned from DTCD to the Kingston Office of the Special Representative of the Secretary-General for the Law of the Sea, as an Administrative Officer on an SPA to the P-2 level. On 1 June 1988, she was promoted from the General Service category to the Professional category at the P-2 level, with retroactive effect to 1 April 1979. The Applicant's performance during the periods 1 January-31 December 1986 and 1 January through 31 December 1987 was rated as "excellent".

On 2 August 1991, the Applicant wrote to the Secretary-General, requesting a meeting as she was "being discriminated against both by the Office of Personnel and the Law of the Sea". She attached her personnel record.

In a reply dated 9 September 1991, the Director, Office of the Secretary-General, acknowledged receipt of the Applicant's letter. After consultations with the Office of Human Resources (OHRM) and the Office for Ocean Affairs and the Law of the Sea, the Director advised the Applicant that:

> "[I]t seems that your request for the reclassification of your post to the P-3 level in 1988 could not be processed in view of the directive from the Office of Human Resources Management that no requests for higher classifications could be made unless there was a post available at the higher level. There was no P-3 post available at that time at the Kingston duty station, and this is still the case. In addition, your Office considers that the responsibilities of the post have not changed, and are not likely to change in the foreseeable future."

The Director, Office of the Secretary-General, suggested that the Applicant apply for suitable higher-level posts in other duty stations.

In December 1992, the Office for Ocean Affairs and Law of the Sea (OALOS) was transferred to the Office of Legal Affairs (OLA).

By memorandum dated 24 January 1993, to the Compensation and Classification Service (CCS), OHRM, through the Acting Administrative Officer, OLA, the Applicant transmitted a request, under staff regulation 2.1, for reclassification of her post of Associate Administrative Officer (P-2) "on the basis of the change in functions for this post as reflected in the ... job description which ha[d] been sent to [the Special Assistant to the Special Representative of the Secretary-General for the Law of the Sea] and to [him] in 1988."

On 1 March 1993, the Applicant transmitted her request for the reclassification of her post to the Chief of the CCS, stating that her "previous request dated 24 January 1993 had been forwarded by [the Applicant] through [her] Executive Office but [she understood] that [her] Executive Office ha[d] not yet acted on it." She indicated that, although her department had agreed to proceed with a request for reclassification of her post in 1988, no request had been forwarded to his office.

In a memorandum dated 3 March 1993, to the Chairperson, Appointment and Promotion Committee (APC), the Applicant stated that, although she had not been recommended for promotion by her Department, she "believe[d] the Committee should give fair consideration to adding [her] name to the P-3 promotion register." She advised the Chairperson of the APC that (a) she had been at the P-2 level for almost 14 years and (b) her Department had failed both to transmit her 1988 request for reclassification of her post to the CCS and to provide her with timely performance evaluation reports (PERs).

By memorandum dated 12 July 1993, the Officer-in-Charge, CCS, informed the Applicant that "th[e] [CCS] ha[d] reviewed the duties and responsibilities of [the Applicant's] post as stated in Section A of the job description submitted", and that such job description was still current. He added that, "[e]ven if [OLA] would endorse [her] request for reclassification, the changes in the functions would not be substantive to a degree that a reclassification of the post would be justified." He advised that, "[n]otwithstanding the fact that there ha[d] not been any changes in function which would preclude issuance of a new classification notice, the post ha[d] been rated again, showing that the functions [were] appropriately classified at the P-2 level."

On 9 August 1993, the Applicant submitted to the Chairperson, APC, a recourse for promotion to the P-3 level, pursuant to ST/IC/1993/37 of 9 July 1993.

On 30 August 1993, the Panel on Discrimination and Other Grievances (the Panel on Discrimination) adopted its report on the investigation of the Applicant's December 1992 allegations of discriminatory treatment regarding the classification of her post. Its conclusions and recommendations read, in part, as follows:

> "...
>
> At the very least, there is a pattern of benign neglect on the part of the administrators of [the Applicant's] department with reference to [the Applicant's] legitimate expectations for timely performance evaluations and appropriate opportunities for career development. The fact that the current administration has no record of why this situation occurred is not a valid excuse for not rectifying it.
>
> Therefore the Panel recommends:
>
> a. The department immediately process the proper forms which will bring [the Applicant]'s performance record up-to-date;

> b. That an audit be done of [the Applicant]'s functions and, if it is still classified at the P-2 level, she should be given priority consideration for all P-3 posts within the department. If the post is classified at the P-3 level, her promotion to that level should be retroactive to the date she first submitted her new job description."

In this respect, the Panel on Discrimination noted that the Applicant had not received a performance evaluation since 1988, the year she had been officially promoted to the Professional category, and had requested that her post be upgraded.

On 29 September 1993, the Applicant appealed to the Chairperson, Classification Appeals and Review Committee, the decision to confirm the classification of her post at the P-2 level.

On 3 December 1993, the Vice-Chairperson, APC, advised the Applicant that "notwithstanding the additional information [she had submitted], the re-examination of [her] case by the Appointment and Promotion bodies did not reveal that there were sufficient grounds to amend its previous decision."

By memorandum dated 15 August 1994, to the Coordinator of the Panel on Discrimination, the Assistant Secretary-General, OHRM, advised that the revised job description prepared by the Applicant in 1988 "basically describe[d] the same responsibilities as [were] depicted in the original job description". The post had been re-evaluated and the Applicant had been informed that it would still be classified at the P-2 level. In addition, he noted that, on information from the Executive Officer, OLA, "OALOS would soon be restructured, and that pending the restructuring any classifications in OALOS were on hold." Agreeing that the Applicant should receive a PER for the period 1988 to the present, he requested the department to initiate the process. The Applicant signed the PER for this period, which gave her an overall rating of "a very good performance".

On 4 November 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the Administration's decision not to recommend her inclusion on the 1992 P-3 Promotion Register.

On 30 June 1995, the Executive Officer, OLA, wrote to the Applicant, informing her that her post was to be abolished with effect from 1 October 1995 and that her permanent appointment would be terminated as of 30 September 1995.

On 5 July 1995, the Applicant wrote to the Secretary-General requesting a review of the administrative decision to terminate her permanent appointment.

The JAB adopted its report on 25 August 1995. Its considerations, conclusion and recommendations read as follows:

> "23. The Panel first noted that a staff member has no right to be promoted. There is, however, a right to be given due consideration for promotion, in accordance with the Regulations and Staff Rules.
>
> 24. The Panel, after carefully considering the evidence, found that the absence of a PER for the Appellant at the time [that] promotion was considered was of critical importance in this context. The Panel noted that the Appellant had no PER for a long time, and had finally received a PER covering the period 1 January 1988 to 30 April 1995. The long delay in providing the staff member with her PER was a violation of the rules. The Panel found that the PER was of little use and value because of the long delay in preparing it, and because of the length of the period covered.
>
> 25. It was not for the Administration to determine that the lack of a PER did not have any influence on the APP [Appointment and Promotion Panel]'s decision not to recommend the promotion of the Appellant. A staff member's PER is considered a vital element in the promotion process. It is impossible for a staff member to receive due consideration, if one of the essential documents in determining a staff member's qualification is missing. The Panel found that whatever the thinking of the Appellant's department was, there was no reason for the department not to give her a PER. The Panel concluded that the absence of the Appellant's PER was a denial of the Appellant's right of due process.

26. The Panel found the Administration's contention that the long delay in the PER was 'an unfortunate administrative oversight', and that because such a delay was 'not limited to the [A]ppellant's situation, it [could] hardly be cited as discrimination' to be unconvincing.

27. On the other hand, the Panel noted that the Appellant had not applied for any higher posts and that although the Appellant was not required to do so, she may thereby have missed opportunities for promotion.

28. The Panel concluded that although the Appellant had been at the same level for 14 years, that fact of itself was not convincing evidence of discrimination."

Recommendations

29. In light of the above, the Panel recommends that the Appellant be given due consideration for vacancies for which she is qualified and provided she applies.

30. In addition, the Panel unanimously recommends that the Appellant be given three months' net base salary as compensation for the violation of her right to due process, by the Administration's failure to provide her PERs in respect of her service, as and when required by the Staff Rules."

On 6 October 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB's report and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has noted the Board's finding that there was no convincing evidence of discrimination. It also found that your right to due process was violated in the handling of your performance evaluation report and in consideration thereof recommends that you be paid three months' net base salary. The Secretary-General wishes to recall that promotion is within the Secretary-General's discretion and that, while there were some procedural irregularities in your case, there is no basis to conclude that, had such irregularity not taken place, you would have been promoted. Moreover, there is no evidence of quantifiable damage warranting the Board's recommendation for payment of three months' net base salary. The Secretary-General wishes to express his regret that excessive delay and

> irregularities occurred in your case and he has decided that you be paid compensation in the amount of $1,000 (one thousand) dollars. He has also decided, in accordance with the Board's recommendation in paragraph 29 of the report, that you be given due consideration for vacancies for which you are found to be qualified and provided you apply."

On 23 April 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration improperly refused the Applicant's request for reclassification of her post, thereby denying the Applicant due process.

2. The Applicant was not given full and fair consideration for promotion, as evidenced by the fact that she had 14 years of excellent service with the Organization and yet was not promoted above her entry-level post.

3. The decision not to select the Applicant for promotion was motivated by prejudice or other extraneous factors.

Whereas the Respondent's principal contentions are:

1. The plea that the Administration improperly refused to submit a request for reclassification of the Applicant's post is not properly before the Tribunal.

2. A staff member does not have a right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion.

3. The decision not to select the Applicant for promotion was not motivated by prejudice or other extraneous factors.

The Tribunal, having deliberated from 9 to 25 July 1997, now pronounces the following judgement:

I. The Applicant was promoted to the P-2 level in 1988, with retroactive effect from 1979. Subsequent to her promotion in 1988, the Applicant commenced to take the necessary steps for the reclassification of her post to the P-3 level, in the belief that her department, the Office of the Law of the Sea, had supported this reclassification. The Applicant's initial request for reclassification in 1988 now results in this appeal to the Tribunal nearly eight years later.

II. The Applicant also appeals an administrative decision by the Secretary-General, upon the recommendation of the Appointment and Promotion Committee, not to include the Applicant's name in the 1992 P-3 Promotion Register. The Applicant claims that the promotion review process was tainted by procedural irregularities and lack of due process. She asserts that the denial of her request for promotion was the culmination of a long pattern of discrimination based on her status as a female staff member, who was not a lawyer, in a small, local, legal office, and the animosity against her resulting from an earlier dispute with the Respondent for her initial promotion to the P-2 level.

III. Before addressing the merits of the Applicant's case, the Tribunal first considers the Respondent's contention that the issue of reclassification is not properly before the Tribunal. The Applicant, in her observations on the Respondent's answer, agrees that the issue before the Tribunal is whether she was wrongfully denied fair consideration for promotion. There is no dispute that the issue of due process is properly before the Tribunal. However, the Applicant further claims that the allegation of longstanding discriminatory treatment is also properly before the Tribunal. It appears to the Tribunal that the Respondent mischaracterizes the nature of the Applicant's claims. The Applicant is not appealing, per se, the denial of reclassification to the P-3 level. Rather,

the Applicant is alleging that the decision to deny her promotion was the culmination of a pattern of discrimination and prejudice. The Applicant placed this issue before the Joint Appeals Board (JAB), and thus may appeal the issue before the Tribunal. That this claim implicates the circumstances surrounding the Applicant's request for reclassification prior to her request for promotion cannot mean that the claim does not also arise from the Secretary-General's denial of promotion. Therefore, both the due process claim and the discrimination claim properly arise from the administrative decision at issue in this case.

IV. The principal procedural irregularity cited by the Applicant, is the Respondent's failure to conduct performance evaluations in accordance with established procedures. The Applicant did not receive a performance evaluation report (PER) from 1988 until 1995. Prior to 1988, she had consistently received PER ratings of "excellent" and "very good". However, at the time of her request for promotion review in 1993, there was a four year gap in her performance record, due to the Respondent's failure to follow his own performance review procedures.

The JAB found, and the Tribunal concurs, that the absence of a current PER "was of critical importance" in the context of a promotion review and that the "long delay in providing the staff member with her PER was a violation of the rules." The Tribunal also agrees with the JAB's conclusion that the absence of an updated PER was a violation of due process. The Tribunal has previously concluded that when a denial of promotion is based on incomplete and inaccurate information, "the Applicant's right to full and fair consideration for promotion [is] not adequately respected". (Cf. Judgements No. 592, Sue-Ting-Len (1993), and No. 586, Atefat (1992)).

V. The Tribunal need not determine whether the Applicant would actually have received a promotion had her performance record been complete. It is sufficient for the Tribunal to find that the appropriate procedures were not followed in the Applicant's promotion review. This itself constitutes a violation of the Applicant's due process rights.

VI. The Tribunal further notes that the Panel on Discrimination and Other Grievances (the Panel on Discrimination) had recommended to the Respondent, in August 1993, that he update her performance records. The Respondent failed to provide an updated performance report until August 1995, almost two years after the Panel's recommendation and more than six years after her last PER. The Tribunal finds that this delay constitutes a serious violation of due process. The Tribunal has previously held that:

> "[i]f the Panel on Discrimination is to continue to serve the valuable purposes for which it was established and to carry out its mission effectively, it is essential, ..., that the Respondent react with reasonable promptness to the Panel of Discrimination reports regardless of whether it agrees or disagrees with them." (See Judgement No. 507, Fayache (1991), para. XVII).

In this instance, the Respondent's delay of one year in responding to the Panel's report, and his further twelve month delay in meeting the Panel's recommendation had the effect of undermining the Panel's work and purpose. It also unnecessarily jeopardized the Applicant's chances of receiving a promotion. This was a clear violation of the procedures established by the Respondent and a violation of the Applicant's right to fair treatment.

VII. The Tribunal next examined the Applicant's claim that she had been the victim of a longstanding pattern of discriminatory and prejudicial treatment. While the decision of the Compensation and

Classification Service (CCS) denying the Applicant reclassification to the P-3 level is not itself before the Tribunal, the process leading up to that decision is probative of the Applicant's discrimination claim. The Tribunal notes that the Applicant's attempt, since 1988, to receive adequate redress for her request for reclassification to the P-3 level had been rebuffed by refusal and inaction. Her initial submission in 1988 of a new job description at the request of her supervisors was never acted upon, thereby denying her an opportunity for review of the reclassification of her post. In 1992, the Applicant again attempted to obtain such a review once the Office of the Law of the Sea had been transferred to the Office of Legal Affairs (OLA). The OLA refused to complete the form, again denying the Applicant a formal review of her request. Under pressure from the Applicant, the OLA sought, instead, an informal review of the request. Ultimately, the CCS denied the Applicant's request for reclassification. When the Applicant appealed this denial to the Classification Appeals and Review Committee, she received no response. Her appeal was never heard.

VIII. The Tribunal finds that the delay and inaction were inappropriate and contributed to the Applicant's belief that she was being discriminated against because of her status as a female who was not a lawyer. The Applicant was also under the impression that the Respondent was retaliating against her for her earlier dispute over her promotion to the P-2 level. In the view of the Tribunal, all staff members are entitled to be dealt with in good faith and in a manner that is fair. Failure to abide by established procedures gives rise to dissatisfaction and low morale and threatens the integrity of the entire Organization. It also leads to unnecessary and costly litigation. The Tribunal believes that the Applicant's request for reclassification was not dealt with efficiently, promptly or in good faith. As a result, the Applicant's claim has

been unnecessarily prolonged for eight years and a good staff member has been given the impression of wrong-doing by the Organization.

IX. However, despite the Tribunal's finding that the Respondent's conduct in this case was egregious, the Tribunal agrees with the JAB that there is no evidence of a pattern of discrimination. In August 1993, the Panel on Discrimination described the Respondent's treatment of the Applicant as "benign neglect". Two years later the JAB concluded that there was no convincing evidence of discrimination. In the Tribunal's view, nothing has changed to modify this conclusion. The Tribunal noted in a previous case that:

> "... There is a vast difference between cases of [discrimination] and cases in which supervisors simply do not share a staff member's evaluation of his own qualifications, performance or merit, or in which there is disharmony between supervisors and a staff member for a variety of reasons having nothing at all to do with unlawful discriminatory attitudes." (Cf. Judgement No. 507, Fayache (1991), para. XVIII).

In the present case, the Respondent should have dealt more effectively with the Applicant's request for reclassification. The Tribunal, however, cannot find that the underlying motivation for the Respondent's conduct was discrimination on the basis of gender or retaliation. The evidence submitted regarding the abolition of the Applicant's post and the different treatment she was receiving in comparison to several of her colleagues, do not change the Tribunal's conclusion with respect to the allegations of discrimination.

X. Based on the foregoing, the Tribunal concludes that the Applicant is entitled to compensation for the violations of due process, but not for discriminatory treatment. The Respondent's failure to update the Applicant's performance record until 1995 and the unreasonable delay in responding to the Panel on

Discrimination's report jeopardized the Applicant's career advancement and violated her right to full and fair consideration for promotion.

XI. The Tribunal cannot concur with the Respondent that $1,000 is sufficient to compensate for these serious deficiencies in due process. It finds no reason why the Secretary-General substituted its judgement for that of the JAB in this regard. The Tribunal concludes that the Applicant is entitled to compensation. The Tribunal assesses this compensation to be the equivalent of nine months of the Applicant's net base salary at the rate in effect on the date of the communication of this judgement.

XII. For the foregoing reasons,

(a) The Tribunal orders the Respondent to pay to the Applicant nine months of her net base salary at the rate in effect on the date of the communication of this judgement;

(b) The Tribunal also affirms the JAB's recommendation that the Applicant should receive full and fair consideration for all vacancies for which she applies and for which she is qualified;

(c) The Tribunal rejects all other pleas, including the Applicant's request for costs.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/815
25 July 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 815

Case No. 903: CALIN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Mrs. Deborah Taylor Ashford;

Whereas at the request of Ramona Calin, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application with the Tribunal until 31 March, 30 June, 31 August and 30 November 1994 and 28 February, 31 May, 31 August and 30 November 1995 and 28 February 1996;

Whereas, on 4 January 1996, the Applicant filed an application containing, inter alia, the following pleas:

"... that:

(i) [her] dismissal be reversed as arbitrary;

(ii) the JDC's report be nullified as not supported by the evidence and fatally tainted by violations of due process;

(iii) [she] be awarded the balance of the pay to which she was entitled under the contract of employment ...;

(iv) [she] be awarded damages for the moral injury to her reputation;

(v) the JDC report and the Secretary-General's action increasing the penalty be removed from all files relating to [her];

(vi) there be placed in such files the statement that [her] service to the Organization was satisfactory and that the Organization would consider hiring her again for the same or a similar post;

(vii) an official apology be addressed to [her] in writing for the unjust way in which she has been treated; and

(viii) the circumstances surrounding the violations of due process detailed [in the application] (and particularly the pernicious and vicious vendetta mounted against [her] by the CEO [Chief Executive Officer] of Svay Rieng Province) be investigated."

Whereas the Respondent filed his answer on 3 May 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization, on a short-term contract, as an Information Clerk, at the G-3 level on 11 September 1991, in the Department of Administration and Management. Thereafter, her appointment was extended, and on 2 September 1992, the Applicant was assigned to United Nations Transitional Authority in Cambodia (UNTAC); this assignment was completed on 1 August 1993, and the Applicant returned to Headquarters. By a series of short-term and fixed-term contracts, the Applicant's appointment was extended until 27 September 1993, the date of her separation from service.

On 29 April 1993, a team of trainers from the Electoral Component arrived in Svay Rieng Province, Cambodia, to conduct a training session for presiding officers for the upcoming Cambodian elections. The trainers were Ms. X and the Applicant. They were accompanied by two local staff members, an interpreter and a driver. The group arrived in a Nissan UNTAC vehicle, registration number 452.

On 30 April 1993, Ms. X and the Applicant conducted a training session that lasted the whole day. The following day, they had a short session and then left Svay Rieng for Phnom Penh at approximately 11:15 a.m.

On 1 May 1993, at approximately 12:00 p.m., the District Electoral Supervisor of Svay Rieng Provincial Town reported to the Svay Rieng Provincial Police (Civpol) that about one hour earlier, one of her interpreters and one of the presiding officers reported to her that her portable computer (laptop) was missing from the office. The District Electoral Supervisor suspected that either the trainers, trainees, or others who had been in the electoral office that morning had stolen the laptop. Civpol Headquarters thereupon alerted all District Commanders to look out for UNTAC vehicle no. 452. At the same time, the provincial operations officer alerted the District Commander, Peam Ro District, Prey Veng Province to stop UNTAC vehicle No. 452 at the ferry and to search it.

According to the findings of the Joint Disciplinary Committee (JDC), in a report prepared at a later date, when the car arrived at the ferry, the Peam Ro District Civpol stopped it. They apparently tried to search it, but the Applicant had tried to telephone the people in Svay Rieng and her supervisor in Phnom Penh and allegedly refused to have the car searched. Only after the Applicant failed to reach Svay Rieng and her supervisor in Phnom Penh, did she voluntarily hand over a portable computer (laptop) No. BO - UNCL/486 to Civpol Peam Ro District and a disc. No. BO - UNCL/148.

The Provincial Investigation Group, Svay Rieng Province, prepared a report dated 4 May 1993. The Investigation Group took a statement from the Applicant. In her police statement, the Applicant admitted having taken the laptop for her own use. Ms. X, who accompanied the Applicant in the car, said that she had no idea that their bags contained any laptop until they were intercepted by the police. The police requested the Applicant's permission to

search her house in Phnom Penh, which the Applicant granted. A search was conducted and no other UN property was found.

On 4 May 1993, the Provincial Investigation Group, Svay Rieng Province, after noting that the Applicant admitted taking the laptop for her own use, concluded:

> "It was very clear that [the Applicant] had the intention to steal the laptop for her personnel [sic] use and she knew that the laptop was not hers at all. As she had admitted her mistake, obviously she was guilty."

On 6 May 1993, the Provincial Commander, Civpol, Svay Rieng noted in a memorandum to the Chief of Operations, Civpol Headquarters:

> "[The Applicant] admitted having taken the laptop for her own use and confessed that Miss X who was her companion had no idea of the laptop until she handed it over to Peam Ro Civpol."

On 7 May 1993, the Chief Civilian Personnel Officer stated that "this incident was brought to my attention on 6 May 1993 and I had an interview with [the Applicant] today, 7 May. She admits the allegation. ..."

On 15 May 1993, the Applicant replied to the Provincial Investigation Group's report, "Theft case of a laptop at the Electoral Office, SUG City". She noted that "[f]or the preparation of our training program and materials, computers were an everyday working tool. I inattentively packed the laptop on the back table, together with the left over handouts in one of the two bags we were carrying for transporting material." She explained that "[w]hile in the car travelling towards Phnom Penh, around forty five minutes after our departure from Svay Rieng, I looked for a book in the two rattan bags that we were using to transport materials. I realized that I had a laptop with some yellow label, a mark that I had not seen before. I told my team member that it might be from Svay

Rieng, since by then I was recollecting details from our departure ... I also mentioned to her, that if that [was] the case, I would call ... Phnom Penh, to arrange to send it back. I must admit that I dealt quite lightly with the matter, since I assumed it was not such a big problem." Regarding the search of the car, the Applicant stated as follows: "The car was stopped at a police precinct ... officers ... interviewed us on our identity and asked one of us to take a call, in the office upstairs. ... I volunteered to go and take the call. ... I was told that the call was coming from the Svay Rieng Police. ... I was told that there have been instructions from Svay Rieng Police that our car was supposed to be searched. Officer [A] told me that it was about a missing computer. ... I found the instructions of a car search very strong and I did not understand the reason. I was not asked if we had a laptop. ... I was not able to speak to the Commander ... even if I insisted ardently to talk to the person in charge. I then called my supervisor [in Phnom Penh] to inform her about the incident. She was not to be found. ... I thereafter told Officer [A] that there was no need for the car to be searched, I did have a laptop and I would voluntarily give it to him, which I did. ..." She concluded: "I did not intend to steal the laptop. I did take it, but I have done so mistakenly. When I realized, I was planning to confirm my mistake and return it to Svay Rieng. Unfortunately, it was too late, and the incident proved to have taken a different dimension ..."

On 27 July 1993, the JDC drew the attention of the Secretary-General to the fact that it "found the Civpol investigation report to be substandard and even unprofessional." The JDC adopted its report on 29 July 1993. Its findings and recommendation read as follows:

> "The Committee finds it difficult to understand how [the Applicant] could have inadvertently taken the laptop and not noticed it until a little before being intercepted by the

police. First of all, Ms. [X] states that [neither] a laptop nor any other equipment was part of the training material that was used during this trip. Moreover, Ms. [X] states that no laptop is ever used during her training sessions. What [the Applicant] took was not only the laptop, but also its attachments, namely the adaptor. It does not seem to be difficult to notice a laptop, which has some weight, and an adaptor being packed with all other documents.

[The Applicant], after noticing that there was a laptop among their belongings, did not immediately volunteer the information that she had a laptop that was not hers after being told that the police were instructed to search for a missing laptop (..., 17 May 1993 [the Applicant]'s statements, ...). It was only after she failed to reach the Civpol Commander at Svay Rieng Hqs and [her] supervisor, [in Phnom Penh] that she told Civpol Officer [A] that she had a laptop in her possession.

In her 17 May 1993 statement, [the Applicant] did not deny that she, in her police statement, admitted to hav[ing] stolen the laptop for her personal use. She also did not rebut the police report of 6 May 1993 ... stating that she 'confessed that Ms. [X] ... had no idea of the laptop until she [the Applicant] handed it over to Peam Ro Civpol' (...)

Any aggravating or mitigating factors

It is true that the pre-election period was a stressful one for all UNTAC personnel. Stress may have caused [the Applicant] to not think about whether she had anything to do with an item missing from the Provincial Electoral office, and to not think about getting in touch with Svay Rieng immediately when she noticed a laptop computer in the rattan bags.

This condition, though, does not and should not affect the findings made above. Moreover, all UNTAC personnel were under a lot of stress at the time and the Committee does not find it to be a valid 'excuse'. Personnel joined this peacekeeping mission knowing that it was a hardship mission, and if UNTAC personnel started to be condoned for 'making mistakes' or misconduct during the critical pre-election period, it would be difficult to expect a peacekeeping mission to be carried out in a satisfactory manner.

...

Given the above evidence, findings, and mitigating factors, the Joint Disciplinary Committee recommends to the Secretary-General the following Disciplinary measures against [the Applicant]: (i) written censure by the Secretary-General, and (ii) demotion."

On 24 September 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant the JDC's report and informed her as follows:

"The Secretary-General ... has taken note of the Committee's finding that you had, as charged, taken United Nations property, namely a laptop computer, on 1 May 1993 from the Svay Rieng Electoral office. He has also taken note of the Committee's discussion of stress as a possible factor in your case and its conclusion that this factor does not excuse your behaviour. He has studied the entire record, including all of the statements made by you and by your counsel on your behalf and has concluded that the evidence corroborates the finding of an intentional, not a negligent, taking of United Nations property.

The Secretary-General has concluded that your conduct constituted a serious violation of the UN standards of conduct and integrity expected of each staff member of the Organization and that this misconduct is incompatible with continued service with the Organization.

In the light of this conclusion, the Secretary-General cannot accept the Committee's recommendation regarding disciplinary measures. Pursuant to his discretionary authority to impose an appropriate disciplinary measure, the Secretary-General has decided to separate you from service for misconduct under staff regulation 10.2, paragraph 1 and staff rule 110.3(a)(vii) with effect from the date you receive this letter. The Secretary-General has also decided that you be paid compensation in lieu of notice in accordance with staff rule 109.3(b)."

On 4 January 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JDC procedure violated the Applicant's due process rights.

2. The way the Applicant was treated throughout the incident was unjust; the allegation of theft of a laptop was the result of a personal vendetta against the Applicant.

Whereas the Respondent's principal contentions are:

1. The Secretary-General reasonably concluded that the Applicant's acts were intentional. The Secretary-General's rejection of the Applicant's ex post facto explanations did not violate the Applicant's rights.

2. The Applicant's conduct constituted a serious violation of the UN standards of conduct and integrity.

3. The Applicant was accorded due process.

The Tribunal, having deliberated from 7 to 25 July 1997, now pronounces the following judgement:

I. This case comes to the Tribunal pursuant to staff rule 110.4(d), which provides that disciplinary measures recommended by the Joint Disciplinary Committee (JDC) may be appealed directly to the Tribunal. The JDC recommended that the Applicant be censured and demoted for stealing a laptop computer from the Svay Rieng Provincial Electoral Office. The Respondent accepted the findings of the JDC but rejected the recommended penalty, and instead dismissed the Applicant from service.

II. The Tribunal acknowledges that the Secretary-General exercises broad authority and discretion in defining "serious misconduct" under the Staff Rules and Regulations and in determining the proper punishment for such conduct. (Cf. Judgement

No. 582, Neuman (1992), Judgement No. 479, Caine (1990)). The Tribunal limits its review of the Secretary-General's exercise of that discretion to decisions tainted by prejudice or other extraneous considerations, mistake of fact, or lack of due process. (Cf. Judgement No. 510, Camara (1991), Judgement No. 436, Wield (1988), Judgement No. 563, Khan (1992)).

III. The facts of this case are greatly disputed. In reaching his decision to dismiss the Applicant, the Secretary-General placed great emphasis on the findings of the JDC. Therefore, the Tribunal believes that great weight should be placed on the integrity of the process at the JDC hearing. The Tribunal's review leads to the conclusion that the Applicant's due process rights were not respected either in the JDC hearing or during the investigation preceding that hearing. Because the Tribunal finds evidence to suggest prejudice and lack of due process, it now examines the Respondent's determination that the Applicant was guilty of theft of property belonging to the Respondent and therefore deserved dismissal.

IV. The Tribunal first reviews the JDC's opinion that it was "difficult to understand" how the Applicant could have inadvertently taken the computer as she claimed. The JDC pointed to two pieces of evidence to explain how it reached this conclusion. First, it noted that a colleague testified that the laptop was not part of the training materials used during the trip and that laptops were never used during the training session. However, the Tribunal considers that this finding mischaracterizes testimony given by a colleague to the JDC and in a written statement. In fact, the Applicant's colleague stated that she herself never used a laptop for training sessions because her computer skills were inadequate, but that "[the Applicant] was responsible for using the laptops to prepare the handouts and

adjust the questionnaires in the provinces." She also stated that the Team's office in Phnom Penh had five laptops. These facts lend support to the Applicant's assertion that she inadvertently took the laptop from the Svay Rieng Province, mistaking that computer for one belonging to the Phnom Penh office.

V. The JDC also found, in support of its conclusion that the Applicant could not have inadvertently taken the laptop, that "[i]t does not seem difficult to notice a laptop, which has some weight, and an adaptor being packed with all other documents." The Tribunal agrees with the JDC that it would be difficult for the Applicant to claim that she did not notice packing a laptop with other UN materials. However, the Applicant did not make such a claim. Rather, the Applicant fully acknowledged that she took the laptop and consciously packed it among the other UN materials, but disputes the JDC's conclusion that she took the laptop with the knowledge that it belonged to the Svay Rieng Office. The Applicant maintains that she took the laptop in the belief that it belonged to the Phnom Penh office.

VI. The Tribunal next examined the JDC's conclusion that, by admitting that she took the computer "for [her] own personal use in [her] house", the Applicant confessed to stealing the laptop. The Applicant denies having made this statement. Moreover, though she asserts that, when she told the police that she had made a "mistake" by taking the laptop, she was referring only to a factual "mistake" regarding the ownership of the laptop and not the moral "mistake" of theft, as the police investigators and the JDC concluded. The Tribunal is dissatisfied with the thoroughness of the police investigation and report with respect to this alleged confession. It notes that language difficulties may account for confusion in the investigation and the JDC hearing.

The Tribunal is concerned by the fact that the Applicant signed the police report dated 4 May 1993, in which she stated that she took the laptop for her personal use. However, the Tribunal is equally concerned that the police admitted to forging her colleague's signature on a police statement. The Tribunal accepts the undisputed fact that her colleague later verified the accuracy of the forged statement but does not consider that this removes suspicion from the manner in which the police conducted their investigation. The record provides no explanation why or how the signature came to be forged, and the Tribunal holds that such a serious violation of proper procedures taints the integrity of the process by which the Applicant was found guilty and punished.

VII. The Tribunal finds that several facts lend support to the Applicant's claim that she took the laptop inadvertently. For example, it is uncontested that the laptop was placed among other UN materials inside rattan bags purchased by the Applicant and her colleague for the very purpose of carrying UN materials back to the Phnom Penh office. Two of the Applicant's colleagues verify that the rattan bags were purchased for this purpose and that no personal items were packed in the bags, but were instead kept separate from all UN materials.

VIII. Furthermore, both the Applicant and her colleague emphasized the stressful conditions surrounding their training sessions in Svay Rieng and their departure on 1 May 1993. The team had been travelling for several months conducting training sessions; violence and death punctuated the training session in the Svay Rieng Province; and the tension was aggravated by a verbal confrontation between the Applicant and the Provincial Electoral Officer (PEO) over materials needed for the training session. The JDC accepted that the Applicant was under stress at the time she took the laptop. It also observed that stress may have caused the

Applicant not to consider whether she had anything to do with an item missing from the Provincial Electoral Office when the police stopped the team and informed them that they were looking for a missing item, and not to think about getting in touch with Svay Rieng immediately when she noticed a laptop computer in the rattan bags prior to the police stop. However, these observations apparently did not affect the JDC's conclusion that the Applicant intentionally took the laptop for her personal use. The JDC conceded the impact stress may have had on the Applicant's decision-making ability, yet discounts her claim that she took the computer inadvertently. The JDC's observations strike the Tribunal as inconsistent with its conclusion.

IX. The JDC also emphasized her colleague's statement to the police indicating that she did not know about the laptop until the police stopped the car at the Neak Peon Ferry. The colleague's testimony at the JDC hearing and her statement to the Tribunal indicate that the Applicant <u>in fact</u> informed her shortly before they were stopped by the police that the Applicant may have inadvertently taken a laptop belonging to Svay Rieng. The JDC placed greater significance on a police statement with a forged signature than on the testimony before it. The JDC apparently concluded that the colleague's statement to the police, denying knowledge of the laptop until the car was stopped by the police, undermined the Applicant's claim that she realized she may have inadvertently taken the laptop and intended to call Svay Rieng upon their return to the Phnom Penh office. However, the later testimony, that the colleague was informed about the laptop prior to the police stop, would support the Applicant's claim.

The Tribunal places great weight on the colleague's testimony before the JDC and on a statement by the colleague submitted by the Applicant to the Tribunal that the Applicant did inform her that she believed she had mistakenly taken a laptop

belonging to Svay Rieng and that she would contact the Svay Rieng Office upon her return to Phnom Penh.

X. The Tribunal is also faced with conflicting reports on the circumstances surrounding the police stop at Neak Peon Ferry. The JDC noted that the Applicant refused to allow the police to search the car, that she did not immediately volunteer that she had the laptop upon being informed that the police were looking for a computer, and that she only offered the laptop after failing to reach the Svay Rieng Civpol commander and her own supervisor in Phnom Penh. However, the Applicant and her colleague both contend that the police originally informed them only that there was a telephone call for them, and did not mention until later the necessity of a car search. Upon being informed that their car would be searched, the Applicant admitted that she was concerned about the reason for the search and therefore tried to contact the Civpol commander in Svay Rieng and her supervisor in Phnom Penh for an explanation. The Tribunal does not find this concern to be unreasonable in the circumstances. The Applicant also stated that she was initially told that the police were looking for a "computer", and that she did not immediately make the connection between a computer and a laptop, but rather assumed that the police were looking for a desktop computer. Upon being informed that the police were looking for a "laptop", the Applicant gave the laptop to the police.

The Tribunal finds the details offered by both parties unclear about the sequence of events involved in the police stop. The Tribunal does not comprehend why the Applicant did not connect the missing "laptop" with the missing "computer" right away. However, the JDC itself concluded that stress may have contributed to this failure, and the Tribunal agrees. In the circumstances, the Tribunal finds that the Applicant's delay in turning over the

laptop to the police is not in and of itself proof of the Applicant's intent to conceal a "stolen" laptop.

XI. The Tribunal finds that the conclusions of the JDC, on which the Respondent based his decision of dismissal, either mischaracterized or failed to address certain evidence presented at the JDC hearing. The Tribunal attributes this inadequacy to a failure by the JDC to respect fully the requirements of due process. The Applicant alleges several due process violations that occurred immediately prior to and during the JDC hearing, including inadequate preparation time with counsel as a result of an improper referral to the station's Legal Office; inadequate time to prepare written comments and exclusion of those comments from consideration by the JDC; failure to address adequately allegations of bias concerning one of the JDC panel members; and consideration of hearsay evidence at the hearing. The Tribunal holds that the Applicant's lack of adequate time with her counsel to prepare a defense impaired her ability to present her version of events clearly and concisely and thus accounts for inconsistencies. The Tribunal also finds that the JDC's failure to admit the Applicant's written statements, despite the delay, was an error. Although the JDC was not required to accept the Applicant's comments, the short notice she was given for the presentation of her comments is a reasonable explanation for the delay in their arrival; these comments were critical in presenting her account of the incident. Because of these serious shortcomings in the JDC's proceedings, the Tribunal rejects the Respondent's claim that the Applicant is equitably estopped from raising due process claims because she waived them at the hearing.

XII. The Applicant's assertion that the JDC refused to dismiss a panel list for bias solely on grounds that they could not locate a replacement panel list would, if true, constitute a violation of

due process. However, as the Respondent points out, the grounds for the Applicant's allegation of bias were vague and she presents no evidence in support of her claim. Accordingly, the Tribunal finds that there was no due process violation with respect to the JDC's refusal to remove a panel member.

XIII. The Tribunal is also concerned by the JDC's reliance on a prosecution witness who testified to hearsay. According to staff rule 110.7, the JDC shall normally rely on written presentations and may require the testimony of witnesses either through written deposition, personal appearance, or some other form of communication. However, the testimony of a third-hand witness to the alleged incident does not constitute the kind of reliable evidence needed to overcome the problems that marked this incident from its inception. The Tribunal is left to wonder why the District Electoral Supervisor of Svay Rieng Provincial Town who reported the incident to Civpol, or the staff member who originally reported the theft, or the police officers who investigated the incident and who took the statement of the Applicant and her colleague, did not themselves testify as they would have had been able to fill in the missing details of the incident. The JDC was also unable to ascertain the credibility of the Applicant's accusers since they did not testify - a pivotal point in a case which relies so heavily on disputed facts. Against this third-hand witness stands the testimony of the Applicant's colleague, who was present at both the incident and the investigation and who stated both at the JDC hearing and in her statement to the Tribunal that she believes the Applicant did not take the laptop intentionally.

XIV. The Tribunal respects the JDC's authority to conduct investigations into disciplinary matters and to make recommendations to the Secretary-General. The Tribunal also respects the Secretary-General's authority to exercise his

discretion in defining serious misconduct and in determining appropriate penalties. However, the Tribunal will affirm the Respondent's exercise of discretionary authority only when satisfied that the underlying allegation of misconduct has been proven through a procedure that respects due process and that is not tainted by prejudice, arbitrariness, or other extraneous factors. The Tribunal is not convinced by the proceedings that the Applicant was guilty of theft, and consequently was dismissed, in accordance with due process. The Tribunal is skeptical of the thoroughness and accuracy of the investigation and alleged confession. The Tribunal also finds that any due process violations that may have occurred at the investigation stage were not adequately corrected at the JDC hearing because of further shortcomings in due process at the hearing.

XV. The Tribunal cannot conduct an investigatory proceeding ab initio. Furthermore, as the Applicant is no longer in the service of UNTAC, the disciplinary matter cannot be remanded for final resolution. However, the Tribunal finds that the Applicant's due process rights were violated and she was not given the benefit of the doubt on her alleged theft. She is therefore entitled to compensation which the Tribunal assesses at six months of her net base salary at the rate in effect on the date of her separation from service.

XVI. For the foregoing reasons, the Tribunal orders the Respondent:

(1) To pay to the Applicant six months of her net base salary at the rate in effect on the date of her separation from service.

(2) To expunge the report of the JDC and the Secretary-General's decision and any references to either from the Applicant's file.

The Tribunal rejects all other pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary